The decision in the instant case is not surprising in view of the language of the Court of Appeals in *Riley* v. *Standard Oil Co. of N. Y.*[17] But it is submitted that the Appellate Division went much further in its enlargement of the master's responsibilities than the Court of Appeals intended. In any event, as evidenced by these decisions, the law in New York on this question is in a chaotic state and it remains for the Court of Appeals to define more definitely the limits of the doctrine laid down in the *Riley* case.

"PERSONS INTERESTED" UNDER THE LIMITED PARTNERSHIP ACT.—In the analysis of any case involving a limited partnership, two questions must be asked: First, would the person claiming exemption as a special partner be liable at common law where limited partnerships were unknown?[1] Second, assuming that he would be liable at common law as a partner, has he complied with the terms of the Limited Partnership Act so as to avoid this liability?

At early common law the sharing of the profits of the enterprise was the test of the defendant's liability as a partner. This test was first proposed in the case of *Grace* v. *Smith*[2] and later reaffirmed in *Waugh* v. *Carver*.[3] The rule proving too harsh, exceptions to its application were soon made[4] and doubts were expressed as to the soundness of the rule itself. In *Cox* v. *Hickman*[5] a new test was proposed. Paraphrasing the language of Lord Cranworth, the real ground of liability is, that the trade has been carried on by persons acting in behalf of the party sought to be charged as a partner; that is, that a situation analogous to a case of an undisclosed principle has been created. By this test the defendant would be liable only if he were an entrepreneur.[6] The test of a partnership under the New York law was that of *Waugh* v. *Carver*.[7] With the adoption of the Uniform Partnership Act the law of New York was changed[8] and today New York has the *Cox* v. *Hickman* test.[9]

An agreement among all the parties that they are to be co-enterprisers is a condition precedent to the existence of every partnership. Without this agreement no partnership exists, even though one of the persons has all of the requirements of an enterpriser.[10] So in all partnership cases that arise, general as well as

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[47] See *supra*, footnote 10, p. 305-6.

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[1] See *Coope* v. *Eyre* (1788) 1 H. Bl. 37; *Jacquin* v. *Buisson* (N. Y. 1855) 11 How. Pr. 385, 393.

[2] (1775) 2 W. Bl. 998.

[3] (1793) 2 H. Bl. 235.

[4] The same court that decided *Waugh* v. *Carver* felt that a broker who sold goods and was to have for his own profit whatever sum he could get for them above a stipulated price was not a partner of the owner. *Benjamin* v. *Porteus* (1796) 2 H. Bl. 590; see also *Dry* v. *Boswell* (1808) 1 Camp. 329, 330; *Mair* v. *Glennie* (1815) 4 M. & S. 240 (*semble*).

[5] (1860) 8 H. L. Cas. 268.

[6] For a person to be an enterpriser it is suggested that he must share all or a majority of the following elements of the business: profits, losses, control, ownership of assets. By ownership is meant ownership of the same interest—*e. g.*, the mortgagor and a mortgagee do not share ownership; neither do trustee and *cestui que trust*; but co-mortgagors share the same interest, as do co-trustees.

[7] In the case of *Champion* v. *Bostwick* (N. Y. 1837) 18 Wend. 175, the test applied seems to be that of *Waugh* v. *Carver*. In *Burckle* v. *Eckhart* (N. Y. 1845) 1 Denio 337, the court discusses the *Cox* v. *Hickman* test, *supra*, footnote 6, but finally goes back to the *Waugh* v. *Carver* test. The court says that in this case profits were given in compensation for services, thus coming under the exception mentioned *supra*, footnote 4. In *Smith* v. *Wright* (N. Y. 1854) 4 Abb. App. 274, the court clearly followed *Waugh* v. *Carver*.

[8] Uniform Partnership Act, § 7 (4).

[9] *Supra*, footnote 6.

[10] *Burnett* v. *Snyder* (1880) 81 N. Y. 550; *Wild* v. *Davenport* (1886) 48 N. J. L. 129, 7 Atl. 295; Uniform Partnership Act, § 18 (g).

limited, we must ask whether such an agreement has been made. If it has we must proceed to determine whether, by the terms of this agreement, the defendant has a majority of the elements of an entrepreneur. Only if these two requisites are present, is he liable for firm debts.

In the recent case of *Crehan* v. *Megargel* (1st Dep't 1922) 199 App. Div. 649, 192 N. Y. Supp. 290, the defendants had paid money to one M to invest in a limited partnership under a trust agreement. This provided that the money was to be invested as his own, that the subscribers were without right to make demands upon the firm, that the money so paid was to be subject to the debts of the partnership, and that trust receipts were to be issued by the trustee to the subscribers. If M received any profits they were to be divided among the holders of the trust receipts. A false statement was made in the certificate of partnership, thereby making the "persons interested therein" liable as general partners under § 34 of the Partnership Law.[11] In an action by a firm creditor, the defendants were held not liable because they were not "persons interested" within the meaning of the Statute.

It does not appear affirmatively that the general partners were parties to the trust agreement, nor does it seem that they were even cognizant of it, although this latter fact would make no difference if they were not parties to the agreement. The case, therefore, might be supported under the rule that all the partners were not parties to the agreement.[12] But assuming that they were, can it be said that the defendants had a major number of the elements necessary to make them entrepreneurs? Certainly they shared both profits and losses, but they had no control in the business and did not share the ownership.[13]

It seems from the analysis that the decision may be sustained on either of two grounds. First, the defendants merely shared profits and losses with M and were not co-enterprisers with the other members of the firm, especially since all the partners were not parties to this agreement. Merely sharing profits and losses with M, they could not be held liable for firm debts under any circumstances. Second, assuming that all the general partners were parties to the trust agreement, the defendants could not be liable because they possess only two of the four elements necessary to make one an enterpriser. The burden of proving them co-enterprisers is on the plaintiff and, having proved the existence of only two of the four essential elements, he has not brought forth sufficient proof to sustain his allegation that the defendant is a partner. It seems, therefore, that we are led inexorably to the conclusion that never, under this sort of an arrangement, could the defendants be liable.

But assuming that a defendant could be held liable as a general partner at common law, has he so complied with the Limited Partnership Act that by virtue of this compliance he is able to avoid liability? This depends largely upon the interpretation placed upon the Statute. Some courts take the view that the Statute being in derogation of the common law, must be strictly interpreted;[14] others, and by far the greater number regard the statute as remedial in its nature and in construing it devote more attention to substance than form.[15]

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[11] N. Y. Partnership Law § 94.

[12] See cases *supra*, footnote 10.

[13] As suggested in footnote 6, trustee and *cestui que trust* do not share the same interest. Together they may hold the same interest, but they do not share it as they would if they were co-trustees or *co-cestuis que trust*. Neither did the defendants share the control of the business.

[14] In *Jacquin* v. *Buisson*, *supra*, footnote 1, p. 393, Hoffman, *J.* speaks of the common law as a "strong enemy of limited partnerships." Similar views are expressed in *Pierce* v. *Bryant* (Mass. 1862) 5 Allen 91, 93, 94.

[15] See *White* v. *Eiseman* (1892) 134 N. Y. 101, 103, 31 N. E. 276, 277; *Clapp* v. *Lacey* (1868) 35 Conn. 463, 466.

From an examination of the cases it appears that the purpose of the Statute is twofold; first, the bringing together, for mutual and public benefit, of men of enterprise and skill but little or no capital, and those having money for investment provided that in so doing they do not subject themselves to unlimited liability; second, the protection of that part of the public who deal with and trust the firm. It is evident that the type of construction best suited to the attainment of one of these two objects may be totally different from the one desirable for the attainment of the other. Thus, provisions which cannot affect the rights of third parties will be liberally construed, so as not to forfeit the protection of the Statute without reason; provisions for the protection of third parties ought to be liberally construed in favor of such persons, which means strictly against the special partner.[16]

Among the requirements of the Statute are the filing of a certificate which must state (1) the name under which the partnership is to be conducted; (2) the general nature of the business to be transacted; (3) the names and residences of all the partners, specifying which are general and which special; (4) the amount of capital contributed by the special partners; (5) the time at which the partnership is to begin and end. It also requires an affidavit of one or more of the general partners that the sum specified in the certificate has been actually[17] and in good faith paid in cash by the special partners.[18] If any false statement be made in such certificate or affidavit the persons interested in the partnership shall all be liable as general partners.[19]

In interpreting the Statute, undoubtedly defects of form can be overlooked and disregarded but those of substance cannot. However, it is not easy to determine what is form and what substance.[20] Thus, interpretation of the phrase "actually paid in cash" has resulted in considerable conflict of opinion.[21] It

[16] *Cummings* v. *Hayes* (1902) 100 Ill. App. 347.

[17] N. Y. Partnership Law, § 91.

[18] *Ibid.*

[19] *Ibid.*, § 94.

[20] The publication of the surname "Argall" as "Argale" is a substantial compliance with the Statute. *Bowen* v. *Argall* (N. Y. 1840) 24 Wend. 496. Stating that capital has been "actually paid" is equivalent to "paid in cash." *Johnson* v. *McDonald* (N. Y. 1855) 2 Abb. Pr. 290. An unintentional publishing of November for October for the commencement of a partnership where no harm is done is immaterial. *Madison County Bank* v. *Gould* (N. Y. 1843) 5 Hill 309.

But a correct statement of the amount of capital contributed by the limited partner, even though the mistake was the fault of the third person, is essential. *Smith* v. *Argall* (N. Y. 1844) 6 Hill 479, *aff'd* (N. Y. 1846) 3 Denio 435. The duration of the partnership and the names of the parties interested, whether as general or special partners, is essential. See *Cummings* v. *Hayes, supra,* footnote 16, p. 354. In most states the contribution of the special partner must be in cash. *Supra,* footnote 18. In some states the Statute allows the special partner to contribute either money or property or both. See Uniform Limited Partnership Act, § 4; *Holliday* v. *Union Bag & Paper Co.* (1877) 3 Colo. 342. Where this is permitted care must be taken to list and value the property in accordance with the Statute. *Maloney* v. *Bruce* (1880) 94 Pa. St. 249. The contribution of the limited partner must be made in good faith. For typical situations see *Hartford Nat. Bk.* v. *Beinecke* (1903) 80 App. Div. 546, 80 N. Y. Supp. 803; *Metropolitan Nat. Bk.* v. *Sirret* (1884) 97 N. Y. 320. This contribution must be actually in existence and within the control of the general partner. *Richardson* v. *Hogg* (1861) 38 Pa. St. 153.

[21] The statement in the affidavit of a general partner that the special partners together contributed a thousand dollars has been held to be neither a strict nor substantially accurate compliance with the Statute. *Spencer Optical Co.* v. *Johnson* (1898) 53 S. C. 533, 31 S. E. 392. Where a special partner gives a post dated check, even though the check is paid when presented and no one is injured and the whole transaction is carried out in good faith, the statutory requirements are not satisfied. *Durant* v. *Abendroth* (1877) 69 N. Y. 148; criticized in *Pres't. etc., of Manhattan Co.* v. *Laimbeer* (1888) 108 N. Y. 578, 588-9, 15 N. E. 712; but *cf. Hogg*

seems that the "good faith" requirement of the Statute means that the money must be actually paid into the partnership so as to be under the control of the general partner free from all contingencies save those that arise from the nature of the business.[22] The Statute requires the certificate to state the names of the general and special partners and provides that for any false statement all persons interested in the partnership shall be liable as general partners. In the case of *Webster* v. *Lanum*[23] it appeared that the defendant, who was named in the certificate as the special partner, was a masquerader and was never intended to occupy this position. The money paid by him was furnished by two others whose connection with the firm was kept secret, so far as the public was concerned, and who were to receive the profits. The only issue raised by the pleadings was whether the money paid in by him had been paid in good faith. The court held that it had. It seems clear that the statement made in the certificate that the defendant was the special partner was false, but the court refused to decide whether this would make the persons furnishing the capital liable as general partners, as this question was not raised by the pleading or during the trial. It seems that they were clearly so liable.[24] While the facts of this case are similar to those of the instant case, the two may be readily distinguished. The general partners in the *Webster* case were parties to the agreement between the defendant and the persons furnishing the capital; the latter, moreover, shared ownership in addition to profits and losses, thus being entrepreneurs.

It may seem that the words "persons interested" used in the Act are broad enough to include the defendants in the instant case. The court construed these words as applying only to parties whose names appear on the filed certificate. Although this construction may appear to restrict the scope of the statute unduly and while the language of the court may be misleading, a careful analysis shows it to be fundamentally correct. There are only four possible classes of "persons interested" in a limited partnership; active partners, dormant partners, limited partners, and persons, like the defendants in the instant case, who have invested capital but are not entrepreneurs. Members of the latter class, as has been shown, could not be held as general partners at common law and so do not need the protection of the Act. Both active and dormant partners are under a common law liability for firm debts under all circumstances. This leaves to be covered by the Act only the limited partners, who are general partners at common law but have attempted to avoid unlimited liability by compliance with the Statute, and whose names must appear on the certificate of partnership.

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v. *Orgill* (1859) 34 Pa. St. 344. Where a special partner gives an uncertified check on a bank in which he then had insufficient funds to cover it, but provided funds before the presentment of the check and it was duly paid, *Maginn* v. *Lawrence* (N. Y. 1879) 13 Jon. & S. 235, or a United States bond payable to bearer and worth more than par, *Haggerty & Albinola* v. *Foster* (1869) 103 Mass. 17, or part payment in cash and part by the note of a general partner, *Benedict & Burnham Co.* v. *Hutchinson* (N. Y. 1886) 21 Jon. & S. 486, it has been held that these are not payments in cash as required by the Statute. Neither is the statutory requirement of cash satisfied by the contribution by the special partner of his assets in an old firm to which the new firm is succeeding. *Van Ingen* v. *Whitman* (1875) 62 N. Y. 513. However, where money is actually on deposit to the credit of the special partner and absolute control of it is given a general partner by a certified check, the requirement of the statute is satisfied. *White* v. *Eiseman*, *supra*, footnote 15.

[22] It is wholly immaterial from what source a special partner receives the money contributed provided he has title to the money as one has title to a valid gift or to money loaned. *Webster* v. *Lanum* (C. C. A. 1905) 137 Fed. 376; *Lawrence* v. *Merrifield* (N. Y. 1877) 10 Jon. & S. 36.

[23] *Supra*, footnote 22.

[24] "That the persons who contributed the special partner's share of the capital, were liable as general partners does not seem to admit of doubt." Burdick, *Partnership* (3d ed. 1917) 388.